

1 Neil A. Goteiner (State Bar No. 083524)
2 Dennis M. Cusack (State Bar No. 124988)
3 Carly O. Alameda (State Bar No. 244424)
4 Farella Braun & Martel LLP
5 235 Montgomery Street, 17th Floor
6 San Francisco, CA 94104
7 Telephone: (415) 954-4400
8 Facsimile: (415) 954-4480
9 E-mail: ngoteiner@fbm.com, dcusack@fbm.com,
10 calameda@fbm.com

11 Attorneys for Plaintiff
12 COUPONS, INC.

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION

16 COUPONS, INC.,

17 Plaintiff,

18 vs.

19 JOHN STOTTLEMIRE, and DOES 1-10,

20 Defendants.

Case No. 5:07-CV-03457 HRL

**COUPONS' MEMORANDUM OF POINTS
AND AUTHORITIES IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS
THIRD AMENDED COMPLAINT**

Date: November 4, 2008
Time: 10:00 a.m.
Courtroom: 2, 5th Floor
Judge: Honorable Howard R. Lloyd

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Stottlemire’s motion to dismiss the Third Amended Complaint (“TAC”) repeats
3 arguments that the Court has previously considered and rejected. To summarize:

4 First, while Stottlemire agrees that Coupons’ technology, and his efforts to circumvent it,
5 should be reviewed under 17 U.S.C. § 1201(a) as an “access control,” he again asserts that
6 Coupons’ controls are not “effective.” But it’s still the law that the technology’s effectiveness is
7 legally irrelevant, and at best raises factual issues about how the technology works.

8 Second, Stottlemire again argues that Coupons’ technology does not act as a “rights
9 control” subject to 17 U.S.C. § 1201(b), ignoring the Court’s prior ruling that Coupons did state a
10 claim under 17 U.S.C. § 1201(b).

11 In addition, the language and logic of the DMCA embrace a particular technology, and
12 efforts to circumvent it, falling within both 17 U.S.C. § 1201(a) and § 1201(b). One court in fact
13 expressly held – on facts remarkably similar to those in this case, that liability could be
14 established under both sections. It is therefore singularly appropriate to analyze both Coupons’
15 technology, and Stottlemire’s violations, under both sections. Coupon’s technology controls
16 access to downloadable authentic coupons, and simultaneously protects Coupons’ rights as a
17 copyright owner to control the distribution of the coupons, and their reproduction.

18 Stottlemire’s remaining challenges to Coupons’ state law claims are without any merit, as
19 is his request for an award of costs.

20 It is therefore time to move beyond the parties’ allegations about Coupons’ innovative
21 technology and demonstrate how it works in practice and how Stottlemire violated the DMCA.
22 We therefore urge the Court to deny Stottlemire’s motion to dismiss in its entirety, so that this
23 case can be adjudicated fairly based on a complete factual record.

24 **II. FACTUAL ALLEGATIONS**

25 Coupons provides on-line, printable coupons to consumers on behalf of advertisers. TAC
26 ¶¶ 9-10. Coupons’ clients include prominent consumer product manufacturers, advertising
27 agencies, retailers, promotional marketing companies and Internet portals. *Id.* The coupons are
28 subject to copyright protection under federal law. TAC ¶ 12.

1 Advertisers usually want wide distribution of coupons across the target market. They
2 always want to set and limit the total number available in order to control the total amount of
3 discounts, and therefore the cost, of the marketing program. TAC ¶ 13.

4 Advertisers' goals require Coupons to ensure both wide distribution and control over the
5 total number of coupons available in order to provide a valuable product to its customers. The
6 Third Amended Complaint describes Coupons' technological solution to these challenges and
7 particularly how it monitors and prevents unauthorized printing by: (1) controlling the number of
8 total prints per uniquely identified computer and (2) uniquely identifying each coupon within a
9 particular promotion to ensure each coupon's validity. TAC ¶¶ 13-24, 43. These controls work
10 irrespective of whether the advertiser or Coupons, or both offer the coupons online. TAC ¶¶ 10-
11 11.

12 The Third Amended Complaint further details how Coupons' technology employs
13 security features to control the printing and distribution of coupons. TAC ¶¶ 13-20. In addition
14 to keying the security features to individual computers (rather than to individual consumers), and
15 delivering to each consumer's computer a unique identifier, Coupons' system prevents each
16 computer from printing more than the authorized number of coupons. TAC ¶¶ 15-16. Whenever
17 a computer seeks to have a coupon printed, Coupons' security system sends the computer's
18 unique identifier to Coupons' server for verification. TAC ¶ 16. Coupons' system and
19 technology determine if a computer is authorized to obtain a particular print, and if so, the system
20 transmits the coupon directly to the consumer's printer. *Id.* Thus, the consumer's computer must
21 seek and obtain access each time it asks to have a coupon printed. *Id.* If authorized, the computer
22 prints the coupon, which the consumer can redeem at a local store. TAC ¶¶ 11, 21.

23 The security feature limits coupon prints in two relevant ways. First, Coupons implements
24 a network (or campaign) limit governing how many total coupons of a particular offer can be
25 printed for all consumers. For example, an advertiser may authorize 10,000 of a particular
26 coupon to be printed. Second, Coupons' system limits each uniquely identified computer to a
27 printing maximum for each campaign, usually to two prints. TAC ¶ 20. Once a computer limit is
28 reached, the system prevents any access by that computer to a coupon. TAC ¶ 15. This security

1 feature serves Coupons' and its customers' dual objectives of wide consumer distribution and of
2 preventing and monitoring fraud. TAC ¶¶ 13, 19.

3 In addition, Coupons' system uniquely identifies each print. The copyrighted form of
4 each type of coupon remains the same; however, Coupons' software assigns a unique identifier to
5 each coupon within its bar code. This bar code serves to mark each coupon as the one authentic
6 copy of a copyrighted coupon. Concomitantly, each individual coupon print is one in a
7 numerically limited set of coupons. TAC ¶ 18. This feature helps Coupons to track coupons in
8 order to monitor for fraud and distribution patterns. TAC ¶¶ 13, 17.

9 Defendant Stottlemire created, used and distributed a method and software program to
10 circumvent these security features with the express objective of having consumers print more than
11 their authorized number of unique coupons. TAC ¶¶ 25-42. His scheme was effective, in part
12 because he is an expert in online coupons and software programming. Stottlemire understands the
13 technology of coupons management in general, and many of Plaintiff's coupon generation
14 procedures. TAC ¶¶ 27-41. Coupons believes that Stottlemire owns and operates the online
15 forum called The Coupon Queen (www.thecouponqueen.net), in which consumers discuss and
16 trade coupons (the "Coupon Queen Forum"). TAC ¶¶ 26. The Coupon Queen Forum advertises
17 coupons for sale in exchange for a handling fee, all to Stottlemire's financial benefit. *Id.*

18 **III. PROCEDURAL HISTORY**

19 Coupons filed its initial complaint on July 2, 2007 and its first amended complaint on
20 August 29, 2007. On September 24, 2007, Stottlemire filed a motion to dismiss, or in the
21 alternative for summary judgment, a related motion for judicial notice, and a motion for sanctions
22 based on Coupons' unwillingness to withdraw this action. On November 14, 2007, Stottlemire
23 filed an ex parte motion to strike Coupons' opposition to the motion to dismiss. The Court heard
24 the motions on December 4, 2007, and on December 12 the Court denied Stottlemire's motion to
25 strike, denied the motion for sanctions, denied the motion for summary judgment, and denied in
26 part and granted in part the motion to dismiss, with leave to amend. Specifically, leave to amend
27 was granted in order for Coupons to elaborate on allegations demonstrating that Stottlemire's
28 actions were not authorized. *See* Court Order dated Dec. 12, 2007, pp. 6-7. Coupons timely filed

1 its second amended complaint (“SAC”) on December 27, 2007. Stottlemire responded to the
2 SAC with a second motion to dismiss on February 26, 2008. On March 25, 2008, the EFF filed
3 its Amicus Brief.

4 On July 2, 2008, the Court granted in part and denied in part Stottlemire’s motion to
5 dismiss. The Court granted the motion to dismiss the First Cause of Action under 17 U.S.C.
6 § 1201(a), with leave to amend. The Order denied the motion to dismiss as to the Second Cause
7 of Action under 17 U.S.C. § 1201(b). The Third and Fourth Causes of Action, for statutory and
8 common law unfair competition, were dismissed with leave to amend. The claim for conversion
9 in the Fifth Cause of Action was dismissed without leave to amend. The motion to dismiss the
10 claim for trespass to chattels in the Fifth Cause of Action was denied.

11 Coupons timely filed its Third Amended Complaint on July 22, 2008. Stottlemire’s
12 motions to dismiss and for sanctions followed.

13 **IV. ARGUMENT**

14 **A. Legal Standard**

15 This Court summarized the applicable Federal Rule of Civil Procedure 12(b)(6) standard
16 to test the legal sufficiency of Plaintiff’s claims in its December 12, 2007 and July 2, 2008
17 Orders. Plaintiff’s TAC meets Rule 12(b)(6) standards by alleging enough facts, “to state a claim
18 to relief that is plausible on its face,” and “to raise a right to relief above the speculative level.”
19 *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (U.S. 2007). The issue is not whether
20 Coupons will ultimately prevail, but whether Coupons is entitled to offer evidence to support its
21 claims. *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). Further, it is
22 beyond cavil that with Stottlemire’s demonstrated expertise, the TAC, “give[s] the defendant fair
23 notice of what the . . . claim is and the grounds upon which it rests.” *Erickson v. Pardus*, 127
24 S.Ct. 2197, 2200 (U.S. 2007).¹

25
26 ¹ Dismissal under Fed. R. Civ. Proc. 12(b)(6) is likely “only in the relatively unusual case in
27 which the plaintiff includes allegations that show on the face of the complaint that there is some
28 insuperable bar to securing relief”; Rule 12(b)(6) dismissals are especially disfavored “when the
asserted theory of liability is novel . . . since it is important that new legal theories be explored and
assayed in the light of actual facts rather than a pleader’s suppositions.” Wright & Miller, 5B
Federal Practice and Procedure: Civil 3d § 1357 at 690-692, 701. “A suit should not be dismissed

1 **B. Coupons Adequately Alleges Effective Control Over Access To Its Coupons**

2 Stottlemire appears to agree that Coupons' system operates as an "access control" such
3 that Stottlemire's conduct should be reviewed under 17 U.S.C. § 1201(a).² Stottlemire, however,
4 exhumes an unsuccessful argument from his motion to dismiss the First Amended Complaint:
5 that Coupons cannot allege a technological measure that controls access effectively where the
6 coupons are printed on paper and can be easily photocopied. *See* Defendant's Motion to Dismiss
7 or in the Alternative, for Summary Judgment, filed September 24, 2007, at 4, 7, 9, 14-15. The
8 Court rejected this argument. *See* Order on Defendant's Motion to Strike, etc., December 12,
9 2007, ("December 12 Order") at p. 5.

10 This attack, like Stottlemire's previous attacks on the efficacy of Coupons' security
11 measures, is misplaced. The strength of the security measure is legally irrelevant.³ *See Universal*
12 *City Studios, Inc. v. Reimerdes, supra*, 111 F.Supp.2d 294, 317-318 (S.D.N.Y. 2000); *321 Studios*
13 *v. Metro Goldwyn Mayer Studios, Inc.*, 307 F.Supp.2d 1085, 1095 (N.D. Cal. 2004) (citing
14 *Reimerdes* for the proposition that CSS "effectively controls access" to a copyrighted work within
15 the meaning of the statute, whether or not it is a strong means of protection). *Reimerdes* stated
16 that a defendant's contention that a security measure did not meet the requirements of section
17 1201(a)(2)(A) because it was a "weak cipher" was "indefensible as a matter of law." *Id.* at 317.
18 The court clarified that the statute expressly provides that "a technological measure 'effectively
19 controls access to a work' if the measure, in the ordinary course of its operation, requires the
20 application of information or a process or a treatment, with the authority of the copyright owner,
21 to gain access to a work." *Id.* at 317-318. A technological measure, therefore, "effectively

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23 if it is possible to hypothesize facts, consistent with the complaint, that would make out a claim." *Graehling v. Village of Lombard, Ill.*, 58 F.3d 295, 297 (7th Cir. 1995).

24 ² *See* Stottlemire's Notice Of Motion And Motion To Dismiss Plaintiff's Third Amended
25 Complaint For Failure To State A Claim On Which Relief May Be Granted, filed September 22,
26 2008 ("Stottlemire's Brief"), at 10:19-20.

27 ³ Nonetheless, as we previously pointed out in response to Stottlemire's motion for summary
28 judgment, it requires a high degree of technical savvy to know how to find the relevant files and
29 to perform the necessary operations on the computer to locate them. *See* Coupons' Opposition to
30 Stottlemire's Motions to Dismiss, for Sanctions and for Summary Judgment, filed November 13,
31 2007, at p. 14, and the Weitzman Decl., ¶ 9, cited therein.

controls access” to a copyrighted work if its function is to control access, *regardless of whether it is successful in doing so*. *Id.* at 318. The court stated bluntly:

[D]efendants’ construction, if adopted, would limit the application of the statute to access control measures that thwart circumvention, but withhold protection for those measures that can be circumvented. In other words, defendants would have the Court construe the statute to offer protection where none is needed but to withhold protection precisely where protection is essential. The Court declines to do so. *Id.*

That a user might be able to photocopy a printed coupon, or change computers to obtain more coupons, is irrelevant to the analysis under the DMCA. The fact remains that the ability to gain access to and download a coupon offered on-line is controlled by Coupons’ technology.

In addition, a coupon is not *legally* obtainable through a photocopy. A store coupon downloaded from Coupons’ system states that they are “void if reproduced” or “void if copied” (TAC ¶ 22). Photocopying one would be a clear, direct, unlawful infringement of Coupons’ copyright. Thus, there is no *lawful* ability to obtain a coupon through a photocopy.

Moreover, Stottlemire’s own conduct as alleged in Coupons’ TAC and as he tacitly admits, trumps his photocopy argument. If Stottlemire or any of his Coupon Queen customers could have been satisfied with mere photocopies of any printed on-line coupons, we would not be here. Photocopied coupons are different from downloaded coupons, because the photocopy does not have a unique identifier. The unique identifier embedded in each barcode allows Coupons to track each coupon, note unauthorized duplicates, and thus monitor for fraud. TAC ¶¶ 13, 17. Stottlemire went out of his way to create a technology to gain access to on-line coupons, not photocopied coupons. Coupons has properly alleged that Stottlemire aimed his scheme at circumventing Coupons’ technological security measures to control access to authentic *on-line* coupons.

Stottlemire’s second assertion that Coupons’ system does not control access since consumers can give away their authentic and unique coupons to a friend is frivolous. (Stottlemire’s Brief, at 10.) The gift of a coupon does not create a new copy of the coupon, does not impair any of Coupons’ copyrights, and is irrelevant to Coupons’ system designed to control access to the original coupon print in the first instance. Stottlemire created a tool to circumvent

1 Coupons' technology in order to obtain original prints from on-line. That is all that is at issue
2 here and is fully protected by the DMCA.

3 Stottlemire's third, and overarching, factual assertion that Coupons leaves "another route
4 to obtain" its coupons "wide open and without regard to who is in possession of the work"
5 (Stottlemire's Brief, at 9:25-27), does not make it true either as a matter of fact or law,
6 irrespective of how often he asserts it. The complaint more than adequately alleges that there is
7 no wide open route for others to obtain possession of authentic coupon printings, except for
8 Stottlemire's illegal scheme.

9 Stottlemire's continued reliance on *Lexmark International, Inc. v. Static Control*
10 *Components, Inc.*, *supra*, 387 F.3d 522 (6th Cir. 2004), remains wholly inapposite. In *Lexmark*, a
11 printer manufacturer brought an action against the seller of a computer chip used in
12 remanufactured toner cartridges, alleging a violation of its copyright in a toner loading software
13 program and violations of the DMCA. *Id.* at 529. Specifically, Lexmark sold toner cartridges for
14 its printers that only it could refill and that contained a microchip that prevented its printers from
15 functioning with cartridges it did not refill. *Id.* The defendant chip seller mimicked Lexmark's
16 computer chip and sold it to companies for use in remanufactured toner cartridges. *Id.* Lexmark
17 claimed that the chip violated the DMCA by circumventing a technological measure designed to
18 control access to its toner loading software program. *Id.* The court rejected the argument. *Id.* at
19 551. The court explained that there were no measures in place to control access to that program.
20 *Id.* at 546. Rather, anyone who purchased the printer could read the literal code of the program
21 directly from the printer memory, with or without the help of an authentication sequence. *Id.*
22 Because no security device was in place to protect access to the program, there was nothing to be
23 circumvented. *Id.* at 547. In contrast, there is no dispute here that Coupons' system contains a
24 security device to control access to coupon prints offered on-line.

25 *Lexmark* made clear that its analysis did not turn on the *degree* to which a measure
26 controlled access to a work because "a precondition for DMCA liability is not the creation of an
27 impervious shield to the copyrighted work." *Id.* at 549. Rather its conclusion relied on the fact
28 that for Lexmark, there was simply nothing to circumvent. *Id.*

1 For the same reasons, *Storage Technology Corp. v. Custom Hardware Engineering &*
2 *Consulting, Ltd.*, 2006 U.S. Dist. LEXIS 43690 (D. Mass. June 28, 2006), is inapposite. There, as
3 in *Lexmark*, the plaintiff could in fact point to *no* technology that actually restricted access to the
4 computer code at issue. This is because “CHE has asserted and STK has not denied that any
5 customer who owns an STK system can access and copy RTD Code.” *Id.* at *25.

6 Here, Coupons has alleged that it has security measures in place to control access to its
7 copyrighted, uniquely identifiable and therefore authentic, coupons. TAC ¶¶ 13-20. Those
8 security measures effectively control access to the coupons in their ordinary operation.
9 Stottlemire’s assertions about the ability to photocopy (Stottlemire’s Brief, at, e.g. 9) ignores
10 those allegations describing the fact that Coupons’ technology produces uniquely numbered
11 coupons for download from the Internet (TAC ¶ 17), and it is to *these* coupons that Coupons’
12 technology is designed to control access.

13 Stottlemire mis-cites *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001), and
14 *Sony Computer Entertainment America, Inc. v. Divineo*, 457 F.Supp.2d 957 (N.D. Cal. 2006), for
15 the proposition that to succeed under 17 U.S.C. § 1201(a), a plaintiff must show that it controls
16 access to the work even when it is out of its possession. These cases do not hold or even imply
17 such a rule. *Corley* upheld the trial court’s decision in *Universal City Studios v. Reimerdes*,
18 *supra*, 111 F.Supp.2d 294, 317-318 (S.D.N.Y. 2000). In *Reimerdes* (and as we discussed above),
19 the court held that “effective control” means whether the *function* of the technology is to control
20 access to the work. The defendant in that case did not even challenge that ruling on appeal in
21 *Corley*. There was no discussion whatsoever in either the trial court or the appellate court of the
22 relative ability to control access once the work is out of the owner’s possession.

23 The court in *Sony Computer* in fact rejected an argument similar to Stottlemire’s. There,
24 the defendant argued that Sony’s authentication process for its computer games did not
25 effectively control access because there were many other ways of getting access to the games
26 through other circumvention devices already out there. 457 F.Supp.2d at 965. Citing *Reimerdes*,
27 the court held that defendant’s argument was illogical, because otherwise the statute would only
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1 protect technology that perfectly thwarted circumvention, and withhold protection from
2 technologies “precisely where protection is essential.” *Id.*

3 Thus, those decisions support Coupons. Just like in those decisions, by limiting access
4 according to specific computers, and by embedding a unique identifier in each downloaded
5 coupon, Coupons’ technology does in fact function to control access to downloadable coupons.
6 This also practically protects copying once the coupon is no longer in Coupons’ possession,
7 because the unique identifier makes a downloaded coupon distinguishable from an infringing
8 photocopy. Coupons’ system can distinguish the two and make it possible for Coupons to
9 monitor for the unique identifier.

10 Moreover, the encryption technology at issue in *Corley* did not even purport to protect
11 access perfectly once the copyright owner was no longer in possession of the work. For example,
12 an encrypted movie shown on an authorized DVD player can potentially become widely
13 accessible beyond the person authorized to view it. One could video record the movie while it is
14 playing on a screen. One could also rent a hall and invite friends and neighbors, and charge them
15 to view it. Nothing about the encryption technology precludes this unauthorized copying or
16 public performance. It is necessarily imperfect, but serves the purpose for which it is intended.
17 That is all that the DMCA requires, as discussed above (pp. 6-7). If those DVDs could be played
18 in front of hundreds of people and still come within DMCA protection, then surely would
19 Coupons’ works with the alleged access controls, even if a consumer photocopied one or gave his
20 coupons to his friend.

1 **C. Coupons’ System Is An Access Control, Protected By § 1201(a)**⁴

2 Coupons’ system controls access to its coupons in several ways:

3 Access to each coupon print (even the first) must be requested, authorized and granted.

4 Thus, where the system authorizes a computer to make two prints, the system separately
5 authorizes each of the two prints. TAC ¶¶ 15-16.

6 Once a unique computer limit is reached, the system denies access to that computer for
7 that coupon. TAC ¶¶ 18-20.

8 Once a campaign limit is reached, the system denies access to all computers for that
9 coupon. TAC ¶ 20.

10 Coupons’ system only authorizes access for the purpose of delivering a print of the
11 coupon. Without authorization by Coupons’ system, the consumer can obtain no access through
12 his/her computer to an authentic copyrighted coupon. Indeed, a coupon is never even separately
13 displayed on the consumer’s computer screen. Thus, it is *not* the case that access is granted to the
14 coupon, with Coupons’ security feature only working to cap the total number of coupons that can
15 be printed.

16 Stottlemire designed his circumvention software to avoid Coupons’ technology for
17 limiting access to the on-line authentic coupons. Specifically, it operates to delete registry files
18 which otherwise identify the unique computer and bar the computer from gaining access to a
19 coupon after the device limit has been reached. TAC ¶¶ 27-31; *and see* Stottlemire’s Motion for
20 Sanctions, at 4-5 (describing how his software deleted the registry files containing the

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23 ⁴ Although Stottlemire agrees that Coupons’ technology is an “access control” measure subject to
24 17 U.S.C. § 1201(a), we address this issue in light of the Court’s July 2, 2008 Order on
25 Stottlemire’s motion to dismiss the Second Amended Complaint. Stottlemire argued in that
26 motion that Coupons’ technology acted as an “access control,” not a “rights control,” and should
27 be analyzed only under 17 U.S.C. § 1201(a). His amicus, Electronic Frontier Foundation (EFF),
28 argued the opposite – that only “rights controls” (i.e., the right to control copying) were at issue
 and the case should be analyzed under § 1201(b). The Court adopted EFF’s view that, as alleged
 in the Second Amended Complaint, Coupons stated a claim under 17 U.S.C. § 1201(b) but not
 § 1201(a). The Court focused on the allegations that emphasized the system’s restrictions on
 unauthorized “copying” and concluded that there were insufficient allegations to support a
 violation of both “access controls” (17 U.S.C. § 1201(a)) and “rights controls” (§ 1201(b)).

1 computer's unique identifier). Stottlemire did not photocopy coupons; Stottlemire created a
2 program to gain automated, unauthorized access to Coupons' on-line coupons.

3 Coupons' system therefore operates as an access control like the encryption program at
4 issue in *Universal City Studios v. Reimerdes*, 111 F.Supp.2d 294 (S.D.N.Y. 2000). In both cases,
5 technology controls the ability to gain any access to the protected work. In the case of movies on
6 DVDs, the technology controls access for the purpose of displaying the movie on a DVD player.
7 In Coupons' case, the technology controls access for the purpose of producing prints. In both
8 cases, though, the technology works to prevent any access to the protected work except as
9 authorized.

10 As we explain below, that Coupons' technology operates as an access control is perfectly
11 consistent with the technology's operation to protect Coupons' rights as a copyright owner. Since
12 the only purpose for obtaining access is to obtain a print, the same technology that controls access
13 also controls copying.⁵ In addition, the technology operates separately to protect Coupons' rights
14 as a copyright holder to control distribution of its coupons.

15 **D. Coupons Has Stated A Claim Under Section 1201(b)**

16 **1. The DMCA Does Not Preclude Liability Under Both 17 U.S.C.**
17 **§ 1201(a) and 17 U.S.C. § 1201(b) For A Particular Circumvention**
Tool.

18 Notwithstanding the Court's July 2 Order, finding that Coupons stated a claim under
19 § 1201(b), Stottlemire argues that Coupons' technology protects *only* access, and nothing else.
20 Stottlemire is wrong. Coupons' technology protects, in addition to access, its rights as a
21 copyright owner to control both copying and distribution.

22 Section 1201(b) prohibits trafficking in technology for the purpose of circumventing
23 measures that protect a right of a copyright owner under Title 17. The rights of a copyright owner
24 include the exclusive rights to reproduce the copyrighted work in copies, prepare derivative
25

26
27 ⁵ In contrast, in the case of encrypted movie DVDs, access is authorized (or not) for the purpose
28 of displaying it for private viewing, which is not a right separately protected by the copyright
laws.

1 works, distribute copies of the work, perform the work publicly, or display the work publicly. 17
2 U.S.C. § 106.

3 We acknowledge that section 1201(a) is intended to protect technological measures that
4 control access to a protected work, and section 1201(b) is intended to protect technological
5 measures that allow access but protect the rights of a copyright owner. Nothing in the statutes
6 themselves, or their legislative history, purports to preclude the possibility that a particular
7 technology, and the methods of circumventing it, could implicate both statutes. Congress could
8 not have, and did not purport to, imagine all possible technologies and how they might implicate
9 a copyright owner's several different rights (i.e., to copy, distribute, perform, display or prepare
10 derivative works). None of the legislative history comments, or dicta in the cases cited by
11 Stottlemire, remotely suggests that the two sections are mutually exclusive, regardless of the
12 technology at issue. To the contrary, the legislative history explicitly leaves room for technology
13 coming within both sections.⁶

14 One court, in fact, found that the same circumvention method violated both § 1201(a) and
15 § 1201(b). In *Ticketmaster LLC v. RMG Technologies, Inc.*, 507 F.Supp.2d 1096 (C.D. Cal.
16 2007), Ticketmaster claimed that defendants circumvented the technological security measure
17 utilized to prevent purchasers from using automated devices to purchase tickets over its website.
18 *Id.* at 1102. Ticketmaster sought a preliminary injunction based on five claims, including a
19 violation of the DMCA. *Id.* at 1104. The court held that Ticketmaster was likely to succeed on
20 its DMCA claim under both 17 U.S.C. § 1201(a) and § 1201(b).

21 Ticketmaster's claims for liability under both sections of the DMCA were premised on
22 the same factual allegations. A user navigating the ticketmaster.com website accesses webpages
23 in order to complete ticket purchases, subject to a license agreement. *Id.* at 1102. "[W]henver a
24 webpage is viewed on a computer, copies of the viewed pages are made and stored on the
25 viewer's computer." *Id.* at 1105.

26
27 ⁶ See Stottlemire's Brief, at 11-12, quoting *S. Rep. No. 105-190* at 12 (1998): "The two sections
28 are not interchangeable and *many* devices will be subject to challenge only under one of the
subsections..." (emphasis added).

1 Ticketmaster's claims for violation of both 17 U.S.C. § 1201(a) and § 1201(b) were
2 premised on the same automated process of viewing, and thus simultaneously copying, webpages.
3 The court held that plaintiff was likely to prevail on the § 1201(a) "access control" claim because
4 the plaintiff employed technological measures to block automated access to its webpages,
5 defendant's system automated access to those webpages without authorization, and the access
6 infringed plaintiff's rights because it allowed copying of the webpages beyond what was
7 authorized. *Id.* at 1111-1112. This same conduct, the court held, violated 17 U.S.C. § 1201(b)
8 "because Ticketmaster's technological measure "both controls access to a protected work because
9 a user cannot proceed to copyright protected webpages without solving [the technological
10 measure], and protects rights of a copyright owner because, by preventing automated access to
11 the ticket purchase webpage, [the technological measure] prevents users from copying those
12 pages." *Id.* at 1112-13 (emphasis added).

13 In *Ticketmaster*, then, the technological measure and corresponding circumvention
14 method addressed the ability to access and simultaneously copy copyrighted webpages. Here,
15 Coupons' system, and Stottlemire's circumvention software, address the ability to access and
16 simultaneously print copyrighted coupons. There is no meaningful distinction under the DMCA
17 between the technology and circumvention issues in *Ticketmaster* and this case. Both sections of
18 the DMCA are violated by the same conduct.

19 The result in *Ticketmaster*, finding claims viable under both sections, did not turn on the
20 non-exclusive license at issue in that case, as suggested in the Court's July 2 Order (at 4 n.5).
21 The license merely defined, for purposes of § 1201(a) liability, whether access was authorized or
22 not. Coupons similarly has alleged lack of authorization. TAC ¶¶ 22-24, 29-30, 34, 36, 39-40,
23 42, 51-53 (including in contravention of an express license agreement). *Ticketmaster* reached the
24 result it did because the technology at issue simultaneously controlled access and copying. There
25 is no reason to reach a different result here.

26 The Third Amended Complaint clarifies why Coupons' particular technology acts as both
27 an "access control" and a "rights control" with respect to the downloadable coupons. We explain
28

1 above why Stottlemire's circumvention software violates § 1201(a). Because Coupons'
2 technology also serves as a "rights control," Stottlemire's conduct also violates § 1201(b).

3 **2. Coupons' Technology Protects Its Rights To Control Copying.**

4 As in *Ticketmaster*, Coupons' technology simultaneously controls the ability to access and
5 to reproduce a coupon. When access is granted to particular computer, it is granted solely for the
6 purpose of reproducing in print one authentic coupon. A particular computer, once identified, is
7 typically granted authorized access no more than twice, to enable it to obtain no more than two
8 prints of a coupon. In Coupons' system, the same technology serves both to control access and to
9 control Coupons' right to limit the number of authentic, uniquely identifiable prints. Stottlemire's
10 software thus simultaneously circumvents a control over access and a control over Coupons'
11 rights to control printing and distribution. As discussed above, no statutory interpretation or
12 decision suggests that Stottlemire's circumvention violates either 17 U.S.C. § 1201(a) or
13 § 1201(b), but not both.

14 **3. Coupons' Technology Protects Its Rights To Control Distribution.**

15 Coupons' technology keys its limitations on access and printing to an individual uniquely
16 identified computer, as opposed to an individual person. TAC ¶ 15. The purpose of imposing
17 limits on the ability of any one person to print a particular coupon is to ensure wide distribution of
18 coupons among the target market. Coupons determined that limits keyed to an identifiable
19 individual were not effective, and raised privacy concerns. TAC ¶ 18. Coupons therefore
20 developed technology that identifies an individual computer, and keys access and print limits to
21 that computer. *Id.* While an individual could, in theory, go from computer to computer to access
22 and print the same coupon many times over, the effort is impracticable. *Id.*

23 The technology also uniquely identifies each printed coupon. TAC ¶ 17. This serves to
24 mark each coupon as an authentic print of a copyrighted coupon, in much the same way that
25 authorized lithographs of a copyrighted painting may be numbered. *Id.* Because coupons can
26 then be identified and tracked by their unique barcodes, Coupons' system is able to monitor the
27 coupons for distribution patterns and for fraud.

28

1 The computer-keyed limitations on access and printing, and the unique identifier
2 embedded in the coupons, together protect Coupons' right as a copyright owner to control
3 distribution of the coupons. Stottlemire's circumvention technology permits an individual from a
4 single computer to print more authentic copies of the coupon than the device limit allows, in
5 theory up to the "campaign limit"⁷ for the coupon. Because each coupon offer has a campaign
6 limit, each print of an authentic coupon depletes the number of prints available for others who
7 might wish to obtain prints. Stottlemire's circumvention software thus concentrates authentic
8 coupons in individual hands in a way that Coupons' technology otherwise would not allow,
9 interfering with Coupons' right to control distribution of the coupons. See TAC ¶¶ 56-62.

10 **E. Coupons Has Alleged That It Has Suffered Injury In Fact Under**
11 **Section 17200.**

12 Stottlemire's objection that Coupons has not alleged injury in fact makes no sense.
13 (Stottlemire's Brief, at 16.) The TAC plainly alleges that Stottlemire's actions "required Plaintiff
14 to undertake *expensive and time-consuming corrective measures*, required management to *expend*
15 *time and resources* responding to industry concerns, and required Plaintiff to *expend attorneys*
16 *fees and costs* to protect their system." TAC ¶ 67 (emphasis added). These allegations
17 sufficiently allege injury in fact and lost money and property.⁸ Discovery will quantify the actual
18 money expended out of pocket for attorneys fees and costs, company resources (both money and
19 property), and wasted employee productivity as a result of Stottlemire's actions.

20 **F. Coupons Has Alleged A Cause Of Action For Common Law Unfair**
21 **Competition.**

22 Stottlemire repeats another rejected argument: that Coupons has not alleged the elements
23 of a cause of action for common law unfair competition. The only defect the Court found in
24 Coupons' Second Amended Complaint is that Coupons did not clearly allege that Stottlemire

25 _____
26 ⁷ The total number of prints of a particular coupon offer available for all computers across the
Internet community. TAC ¶ 20.

27 ⁸ Indeed, in its July 2, 2008 Order (at 8), the Court granted Coupons leave to amend this cause of
28 action because allegations that, for example, Coupons expended time and money on corrective
measures would resolve any deficiency in the pleading.

1 himself (as opposed to Doe defendants) engaged in a “business.” See July 2, 2008 Order at p. 8.
2 The TAC alleges that Stottlemire himself is an owner of The Coupon Queen, through which
3 Stottlemire engages in the business of trading in store coupons. TAC ¶¶ 26, 69-73.

4 The Court previously rejected Stottlemire’s argument that Coupons did not allege the
5 elements of a common law unfair competition claim⁹ for good reason. Coupons alleges that it
6 expended significant time and money in developing its online Coupons system and the associated
7 coupon printing system. TAC ¶ 43, 72. Stottlemire promoted his circumvention scheme and
8 software over his Coupon Queen online forum. TAC ¶¶ 25-45, 71. Coupons alleged that its print
9 restrictions are critical to the integrity and desirability of Coupons’ technology and to Coupons’
10 business reputation. Stottlemire’s scheme injured that integrity, desirability and business
11 reputation. His misappropriation of coupons for himself and his customers/followers reduced the
12 number of coupons available to legitimate coupon users, interfered in the intended distribution
13 system for the coupons, undermined confidence in Coupons’ technology, and also required
14 Coupons to undertake expensive corrective measures. TAC ¶ 72. The allegations of the TAC are
15 sufficient to put Stottlemire on notice of the basis of his potential liability.

16 Stottlemire is disingenuous when he suggests he never “attempted to secure the trade of
17 Plaintiff while practicing fraud, coercion or other conduct prohibited by law.” (Stottlemire’s
18 Brief, at 17-18.) Coupons is in the business of distributing coupons, on behalf of advertisers.
19 TAC ¶¶ 9-10, 14. Stottlemire is in the business of distributing coupons, on behalf of coupon
20 users. TAC ¶ 26. It does not matter that Stottlemire’s customers are not the advertisers.
21 Stottlemire is still attempting to distribute coupons by using fraud (deceiving Coupons’ system
22 into believing that one computer is actually many different computers) and by violating the
23 DMCA to divert coupons from Coupons’ distribution channels to his own. Stottlemire is doing
24

25 ⁹ The elements of the tort of unfair competition under California law are: “(1) that [a plaintiff]
26 had invested substantial time, skill or money in developing its property; (2) that [a defendant]
27 appropriated and used [plaintiff’s] property at little or no cost; (3) that [defendant’s] appropriation
28 and use of [plaintiff’s] property was without the authorization or consent of [plaintiff]; and
(4) that [plaintiff] could establish that it has been injured by [defendant’s] conduct.” *City
Solutions, Inc. v. Clear Channel Commc’ns, Inc.*, 365 F.3d 835, 842 (9th Cir. 2004).

1 so through his business, Coupon Queen. This conduct sufficiently alleges a claim for common
2 law unfair competition.¹⁰

3 **G. Stottlemire's Challenge To The Trespass To Chattels Claim Is Necessarily**
4 **Moot.**

5 Stottlemire's only challenge to the trespass to chattels cause of action is premised on the
6 assumption that the DMCA claims will be dismissed, leaving nothing to which to append the
7 common law claims pursuant to the Court's supplemental jurisdiction. The DMCA causes of
8 action are sound; therefore, the Court must reject this aspect of the motion to dismiss.

9 **H. No Basis Exists For Stottlemire To Recover Costs.**

10 The DMCA causes of action are sound, and remain to be adjudicated. No basis exists,
11 therefore, for a recovery of costs under 17 U.S.C. § 1203(b)(4).

12 We address separately Stottlemire's Motion for Sanctions in our Opposition to that
13 motion.

14 **V. CONCLUSION**

15 For the reasons stated above, Coupons respectfully requests that the Court deny Defendant
16 Stottlemire's motion to dismiss the Third Amended Complaint.

17
18 Dated: October 7, 2008

FARELLA BRAUN & MARTEL LLP

19
20 By: /s/
Dennis M. Cusack

21
22 Attorneys for Plaintiff
COUPONS, INC.

23
24
25
26 ¹⁰ *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163 (1999),
27 says nothing to support Stottlemire's argument. First, Stottlemire quotes from the concurring and
28 dissenting opinion of Justice Kennard, not the opinion of the court. Second, common law unfair
competition was not an issue in that case.